

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK YARROW RICKMERS,

Defendant and Appellant.

C045872

(Super. Ct. No.  
CM018167)

Defendant Derek Yarrow Rickmers entered a negotiated plea of guilty to two counts of sexual penetration by a foreign object while the victim was unconscious (Pen. Code, § 289, subd. (d); further section references are to the Penal Code unless otherwise specified). In exchange for his plea, an additional count of violating section 289, subdivision (d), and a count of sexual penetration by foreign object while the victim was drugged (§ 289, subd. (e)), were dismissed with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754).

Defendant was sentenced to the middle term of six years for each count, to be served concurrently, with a total of 561 days of presentence custody and conduct credits. He was assessed various fines, fees, and penalties, and was ordered to pay victim restitution in an amount to be determined. The court recommended drug and alcohol counseling pursuant to section 1203.096 and sex offender therapy as a condition of parole. Defendant was advised of his obligation to register as a sex offender (§ 290) and was ordered to provide samples for DNA testing (§ 296, subd. (a)(1)).

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

Our review of the record discloses a sentencing error and a mistake in the abstract of judgment. In the interest of judicial economy, we will address them without first seeking supplemental briefing. Any party wishing to address the issues may petition for rehearing. (Gov. Code, § 68081.)

First, the trial court imposed a total fine of \$1,360 pursuant to section 290.3, including penalty assessments and surcharges as recommended by the probation report. According to the probation report, the sum of \$1,360 includes a \$200 state court facilities construction fund penalty pursuant to Government Code section

70372. However, defendant committed his offenses on October 5, 2002, prior to the effective date for the court construction fund penalty. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1197, fn. 2.) Accordingly, imposition of the construction fund penalty violates constitutional ex post facto principles. (*Id.* at pp. 1195-1199.) The issue is not forfeited by a defendant's failure to object since the surcharge and penalty were unauthorized, i.e., they "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The amount of \$200 must be deducted from the total section 290.3 fine of \$1,360.

Second, the trial court ordered defendant to provide samples for DNA testing pursuant to section 296, subdivision (a)(1). But the abstract of judgment does not reflect this order. Where there is a discrepancy between the oral pronouncement of judgment and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Thus, the abstract of judgment must be amended to include the order.

Having examined the record, we find no other arguable error that would result in a disposition more favorable to defendant.

The judgment is modified to strike the \$200 state court facility construction fund penalty from the total fine imposed pursuant to section 290.3. As amended, the judgment is affirmed. The trial court is directed to prepare a new abstract of judgment reflecting this modification and including the court's order requiring defendant to provide samples for DNA testing pursuant

to section 296, subdivision (a)(1). The court is further directed to send a certified copy of the amended abstract to the Department of Corrections.

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SCOTLAND, P.J.

We concur:

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RAYE, J.

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MORRISON, J.